EXHIBIT A

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

CONCORD MUSIC GROUP, INC., ET AL., *Plaintiffs*, v. ANTHROPIC PBC, *Defendant*.	Case No. 3:23-cv-01092 Chief Judge Waverly D. Crenshaw, Jr. Magistrate Judge Alistair Newbern

CHAMBER OF PROGRESS AND NETCHOICE, LLC'S BRIEF AS *AMICI CURIAE* IN OPPOSITION TO PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

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INTRODUCTION AND INTERESTS OF AMICI CURIAE[1]

Generative artificial intelligence ("AI") holds immense promise. Though still in its infancy, it has captured the public imagination precisely because it has the potential to fundamentally enhance the way we learn and work and live. We are just beginning to see all the ways generative AI can foster creativity, boost productivity, help businesses and governments provide better services, advance scientific research, and make information and education more accessible.

Plaintiffs' motion for a preliminary injunction presents correspondingly immense risk. By asking the Court to prejudge, at the outset of this case, novel and complex legal and factual issues central to the development and use of generative AI, Plaintiffs' motion seeks relief that would stifle the promise and potential of this new technology on a barren evidentiary record. Plaintiffs ask the Court to issue a preliminary ruling carrying sweeping implications: seeking first-of-their-kind legal determinations that the use of material to train an AI model infringes any copyright in that material, that the fair use doctrine does not protect the training process, and that providers of AI tools directly infringe copyrights based on output automatically generated in response to user prompts. These weighty and unresolved issues are also presented in a host of other cases around the country that are making their way through fact and expert discovery and toward summary judgment or trial. They are best resolved in that posture: on a complete record, with the benefit of full factual development and expert testimony. Deciding them prematurely in an expedited summary proceeding, without factual and expert discovery into how generative AI models are made and used, would be a disservice

[1] No counsel for a party in this lawsuit authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution to fund the preparation or submission of this brief. No person or entity, other than *amici*, their members, or their counsel, made a monetary contribution to the preparation or submission of this brief. Defendant is not a member or partner of *amici*.

to the Court, the parties, and the public.

Chamber of Progress is a tech-industry coalition devoted to a progressive society, economy, workforce, and consumer climate. Chamber of Progress backs public policies that will build a fairer, more inclusive country in which the tech industry operates responsibly and fairly, and in which all people benefit from technological leaps. Chamber of Progress seeks to protect Internet freedom and free speech, to promote innovation and economic growth, and to empower consumers. Many of Chamber of Progress' partners currently use, develop, and provide generative AI products and services.

NetChoice, LLC ("NetChoice") is a national trade association of online businesses that works to protect free expression and promote free enterprise online. NetChoice's members rank among the world's most innovative companies, including Meta, Amazon, Etsy, Google, Pinterest, Nextdoor, Snap, TikTok, and X (formerly known as Twitter). NetChoice advocates for free speech and a competitive online ecosystem by challenging laws that subject online businesses to disfavored treatment, and by filing *amicus curiae* briefs in cases that, like this one, could shape the way businesses operate and innovate on the internet.

Chamber of Progress and NetChoice ("*amici*") recognize the incredible promise and potential of generative AI.[2] Large language models, in particular, help *amici's* member companies solve some of the greatest challenges in online content moderation today, including context analysis and identifying novel toxic language patterns in user-generated posts—like creatively worded personal attacks and threats.[3] AI systems also enable more

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[2] *See* Colby Hawker & Emmanouil Koukoumidis, *Improving Trust in AI and Online Communities with PaLM-based Moderation,* Google Cloud Blog (Sept. 7, 2023), https://cloud.google.com/blog/products/ai-machine-learning/google-cloud-text-moderation; *Our New AI System to Help Tackle Harmful Content*, Meta (Dec. 8, 2021), https://about.fb.com/news/2021/12/metas-new-ai-system-tackles-harmful-content/.

[3] *See* Deepak Kumar et al., *Watch Your Language: Large Language Models and Content Moderation,* arXiv (Sept. 25, 2023), https://arxiv.org/pdf/2309.14517.pdf.

rapid detection of child sexual abuse material on large social media services.[4] Continued innovation in generative AI technology will play a critical role in creating a safer, more inclusive online environment.

Amici advocate for a careful, balanced, and fully-informed approach to the legal issues raised by generative AI tools. Striking the proper balance among stakeholders on these important issues requires a fully-developed record. As one of *amici* explained in comments submitted to the US Copyright Office, many of these legal issues "are nuanced, fact-driven arguments that might be ill-suited for quick judicial resolutions." *Comments of Chamber of Progress in the Matter of Artificial Intelligence and Copyright*, U.S. Copyright Office Dkt. No. 2023-6 (Oct. 30, 2023), https://downloads.regulations.gov/COLC-2023-0006-8583/attachment_1.pdf. *Amici* submit this brief to highlight the public interest in the continued development of generative AI tools and to urge the Court not to impede upon that development by issuing a preliminary injunction on a limited record ill-suited for such novel, complex, and important issues. Plaintiffs' motion for a preliminary injunction should be denied, and the merits issues addressed in due course on a complete record.

ARGUMENT

I. Generative AI is delivering immense public benefits and promises to deliver more.

Generative AI holds extraordinary and perhaps unparalleled potential to transform the daily lives of Americans in remarkable ways. This technology is set to unlock new perspectives and modes of expression, improve business efficiency and productivity, foster new opportunities for advancement and collaboration in science, healthcare and education,

[4] Susan Jasper, *How we detect, remove and report child sexual abuse material*, Google Blog (Oct. 28, 2022), https://blog.google/technology/safety-security/how-we-detect-remove-and-report-child-sexual-abuse-material/.

reduce inequality, and help tackle societal challenges like climate change and disaster relief. The open-source traditions and the collaborative nature of the field also promise to unleash a new era of innovation and competition.

While generative AI is still in its infancy, the technology is already seeing wide adoption by consumers and businesses. For example, ChatGPT, the first consumer-facing generative AI chatbot, was the fastest-growing consumer application in history, accumulating over 100 million monthly users within two months, and is now being used by over 100 million people every week.[5] And Bard, Google's consumer-facing generative AI chatbot, grew to over 100 million monthly users within a month of its general release.[6] The vast majority of Fortune 500 companies are developing applications based on generative AI tools.[7] The industry has created tens of billions in revenue, and that number is poised to grow exponentially in the years to come.[8] The various uses of generative AI below illustrate how this groundbreaking technology is already creating progress and causing real-world impact, and will continue to do so. And because training AI models requires access to vast amounts of high-quality, diverse data, a ruling that forbids training models on certain categories of data could jeopardize the development of AI models across a variety of use-cases.

Unlocking creativity. Generative AI is enabling existing artists to explore new forms of expression in novel media, while also lowering the barriers to entry to allow new

[5] Jon Porter, *ChatGPT continues to be one of the fastest-growing services ever*, The Verge (Nov. 6, 2023), https://www.theverge.com/2023/11/6/23948386/chatgpt-active-user-count-openai-developer-conference.

[6] David F. Carr, *As ChatGPT Growth Flattened in May, Google Bard Rose 187%*, SimilarWeb Blog (June 14, 2023), https://www.similarweb.com/blog/insights/ai-news/chatgpt-bard/.

[7] *See supra* n.5.

[8] *Generative AI to Become a $1.3 Trillion Market by 2032, Research Finds*, Bloomberg (June 1, 2023), https://www.bloomberg.com/company/press/generative-ai-to-become-a-1-3-trillion-market-by-2032-research-finds/.

artists, including those with disabilities who may not otherwise be able to participate in art creation, to enter the field and compete.[9] Artists have lauded generative AI's ability to help them "create different kinds of art that [they could] never [create] before" and "expedite[] and streamline[] every one of [their] creative processes." Steven Vargas, *How AI-generated art is changing the concept of art itself*, L.A. Times (Sept. 21, 2022), https://www.latimes.com/projects/artificial-intelligence-generated-art-ownership-bias-dall-e-midjourney/. Generative AI is also significantly reducing the cost and effort needed to produce new creative works. As an example, independent video game studios are using it to modernize and remaster their old games without the otherwise necessary expense and drudgery involved in traditional methods.[10] In these respects, generative AI will massively enhance creativity, enabling new creators, new forms of expression, new audiences, and new markets.

Fostering innovation and competition. The FTC has recognized that generative AI represents a "paradigm shift[]" and a "key inflection point[]" for new entrants to challenge entrenched players in the technology field. *Generative AI Raises Competition Concerns*, Federal Trade Commission (June 29, 2023), https://www.ftc.gov/policy/advocacy-research/tech-at-ftc/2023/06/generative-ai-raises-competition-concerns. Independent AI startups are among the most important pioneers of generative AI and have significantly contributed to the development of the technology. And thanks to intense competitive pressure, companies are releasing open-source models that allow individual developers and unaffiliated companies to iterate on top of existing models to tailor the models for themselves

[9] Dale J. Rappaneau, *Art-generating AI as an accessibility tool for disabled artists*, The Techtualist (Jan. 25, 2023), https://techtualist.substack.com/p/art-generating-ai-as-an-accessibility.

[10] Oli Welsh, *Broken Sword dev 'simply couldn't afford' to remake it without using AI*, Polygon (Aug 23, 2023), https://www.polygon.com/23842925/broken-sword-6-bs1-remaster-charles-cecil.

and their users.[11]

Enhancing productivity. Generative AI is profoundly influencing economic development and productivity across diverse sectors. In software development, over 37,000 businesses are already using tools that can translate natural language into computer code and automatically complete coding projects that humans start, thereby greatly reducing the time spent on repetitive tasks and allowing developers to concentrate on more complex aspects of design and programming.[12] In transportation, companies like Waymo are using sensor data gathered from the real-world to generate extensive 3D models and scenarios for vehicle testing, releasing these datasets to the public to promote the development of autonomous driving.[13] In the e-commerce domain, generative AI is powering image-based shopping experiences and virtual try-on tools for customers, including those with accessibility needs, so that they can see while shopping at home how clothing items look on them.[14] In customer service, merchants have integrated generative AI to assist human agents in responding to customer inquiries and to automate routine tasks for support engineers.[15] The

[11] Dan Milmo, *Llama 2: why is Meta releasing open-source AI model and are there any risks?*, Guardian (July 20, 2023), https://www.theguardian.com/technology/2023/jul/19/why-is-meta-releasing-llama-2-open-source-ai-model-mark-zuckerberg.

[12] Kyle Wiggers, *GitHub makes Copilot Chat generally available, letting devs ask questions about code*, TechCrunch (Dec. 29, 2023), https://techcrunch.com/2023/12/29/github-makes-copilot-chat-generally-available-letting-devs-ask-questions-about-code/.

[13] *See, e.g.*, Bokui Shen et al., *GINA-3D: Learning to Generate Implicit Neural Assets in the Wild*, IEEE/CVF Conference on Computer Vision and Pattern Recognition (CVPR), Vancouver, BC, Canada, 2023 pp. 4913-4926, https://openaccess.thecvf.com/content/CVPR2023/papers/Shen_GINA-3D_Learning_To_Generate_Implicit_Neural_Assets_in_the_Wild_CVPR_2023_paper.pdf.

[14] Lilian Rincon, *Virtually try on clothes with a new AI shopping feature*, Google Blog (June 14, 2023), https://blog.google/products/shopping/ai-virtual-try-on-google-shopping/.

[15] Simon Bamberger et al., *How Generative AI Is Already Transforming Customer Service*, Boston Consulting Group (July 6, 2023), https://www.bcg.com/publications/2023/how-generative-ai-transforms-customer-service.

widespread adoption of generative AI across industries is not only a reflection of the technology's significant potential for sparking economic growth, but also signals a shift towards more efficient, inclusive, and innovative business practices.

Advancing scientific and medical research. Government agencies have recognized that AI is playing an increasingly important role in scientific and medical research,[16] and some projects in the area have seen early successes. For example, AlphaFold, an AI program developed by Google DeepMind that predicts protein structure, has revolutionized the field of structural biology by reducing a process that could take years of lab work to one that can be achieved within minutes.[17] The resulting predictions that have been shared online, covering nearly every known protein, are unleashing a wave of scientific breakthroughs from drug discovery to genetic therapy. *Id.* Doctors and medical institutions are also partnering with generative AI startups to develop synthetic patient data for medical research, to help with the more mundane tasks of summarizing physician-patient interactions, and to reduce time spent on administrative tasks.[18] The valuable insight accumulated through these early experiments should soon enable generative AI's use in more advanced areas of medicine, including producing radiology reports, performing augmented surgical procedures, and offering bedside decision support for patient care.[19]

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[16] Patrizia Cavazzoni, *FDA Releases Two Discussion Papers to Spur Conversation about Artificial Intelligence and Machine Learning in Drug Development and Manufacturing*, U.S. Food & Drug Administration (May 10, 2023), https://www.fda.gov/news-events/fda-voices/fda-releases-two-discussion-papers-spur-conversation-about-artificial-intelligence-and-machine.

[17] Ian Sample, *Team behind AI program AlphaFold win Lasker science prize*, Guardian (Sept. 21, 2023), https://www.theguardian.com/science/2023/sep/21/team-behind-ai-program-alphafold-win-lasker-science-prize.

[18] Belle Lin, *Generative AI Makes Headway in Healthcare*, Wall Street Journal (Mar. 21, 2023), https://www.wsj.com/articles/generative-ai-makes-headway-in-healthcare-cb5d4ee2.

[19] *See, e.g.*, Michael Moor et al., *Foundation models for generalist medical artificial intelligence*, Nature 616, 259-265 (2023).

Reducing inequality and expanding access to information. Tech companies have released AI translation and transcription models that can work across numerous languages, including many unsupported by currently-available commercial tools.[20] These models promise to break down communication barriers and expand access to information for speakers worldwide, while also improving the speed and accuracy of content moderation, by helping content reviewers understand context. Schools are testing AI tutors that provide tailored learning experiences; those personalized tutors allow students to learn at their own pace and teachers to devote extra time to those who need more guidance.[21] And millions of students, including those from under-resourced groups, are learning how to write computer code through AI-powered tools that provide real-time feedback and error correction, enabling students to learn from mistakes immediately and to better understand complex coding principles.[22] Developers are building AI tools capable of generating accurate and photorealistic sign language translations for the deaf and hard of hearing.[23] Such experiments and experiences are boosted by promising research showing that generative AI could play a critical role in reducing inequality and the digital divide, thanks to its ability to disproportionately increase the performance of disadvantaged students and workers.[24]

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[20] Emilia David, *Meta releases multilingual speech translation model*, The Verge (Aug. 22, 2023), https://www.theverge.com/2023/8/22/23840571/meta-multilingual-speech-translation-model-ai.

[21] Natasha Singer, *New A.I. Chatbot Tutors Could Upend Student Learning*, N.Y. Times (June 8, 2023), https://www.nytimes.com/2023/06/08/business/khan-ai-gpt-tutoring-bot.html.

[22] Chris Perry & Shrestha Basu Mallick, *AI-powered coding, free of charge with Colab*, Google Blog (May 17, 2023), https://blog.google/technology/developers/google-colab-ai-coding-features/.

[23] *See, e.g.*, Calum Medlock, *Signapse's Sign Language Translation using Generative AI: Achieving Photo-Realism and Accuracy*, Signapse (May 10, 2023), https://www.signapse.ai/post/signapse-ai-sign-language-translation-photo-realism-accuracy.

[24] Alan Murray et al., *A.I. will reduce inequality by leveling the tech playing field, studies suggest*, Fortune (Sept. 10, 2023), https://fortune.com/2023/09/10/ai-reduce-inequality/.

Fighting climate change. In the past year, AI has begun to demonstrate its ability to provide solutions to societal challenges such as climate change. For instance, researchers and companies are using AI to interpret large quantities of satellite imagery in order to track global greenhouse gas emissions and verify corporate emission reports.[25] AI is also being introduced into wildfire prevention and early warning systems, mitigating risks by identifying areas suitable for controlled burns. *Id.* Studies have also shown that, by using AI models in aviation to predict and avoid areas where aircraft are likely to leave condensation trails in the sky, airlines may be able to reduce by half the creation of such contrails.[26] Specifically highlighting generative AI's ability to process and analyze vast amounts of information, the United Nations is incorporating AI to achieve its Sustainable Development Goals, including providing clean energy for all, building sustainable cities and communities, and combating climate-related natural disasters.[27] Indeed, researchers have warned that halting generative AI development may hinder the progress of climate research, and any regulation of generative AI should be carefully designed to support overall progress.[28]

Closing the gap on access to justice. While also recognizing the risks that AI poses, Chief Justice Roberts recently noted that "AI obviously has great potential to

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[25] Julia Simon, *4 ways AI can help with climate change, from detecting methane to preventing fires*, NPR (Jan. 2, 2024), https://www.npr.org/2024/01/02/1218677963/ai-climate-change-solutions-fires-lithium-methane.

[26] David Gelles, *Curbing Contrails: A Climate Solution in the Skies*, N.Y. Times (Aug. 8, 2023), https://www.nytimes.com/2023/08/08/climate/curbing-contrails-a-climate-solution-in-the-skies.html.

[27] *Explainer: How AI helps combat climate change*, United Nations (Nov. 3, 2023), https://news.un.org/en/story/2023/11/1143187.

[28] Francesca Larosa et al., *Halting generative AI advancements may slow down progress in climate research*, Nature Climate Change 13, 497-99 (2023).

dramatically increase access to key information for lawyers and non-lawyers alike."[29] For lawyers, "[l]egal research may soon be unimaginable without it." *Id.* And for non-lawyers "who cannot afford a lawyer, AI can help"; "[t]hese tools have the welcome potential to smooth out any mismatch between available resources and urgent needs in our court system." *Id.*

* * *

From supercharging creativity and productivity to mitigating the impact of climate change and spurring competition, generative AI is proving to be a powerful force for progress and improving the human condition, and we can expect its positive impact to grow exponentially in the future.

II. A preliminary injunction is an inappropriate vehicle for deciding important, novel, and complex questions about generative AI and copyright law.

Given the promise of generative AI, Plaintiffs' demand for a preliminary injunction presents questions of immense importance to the entire field and thus to the public. These questions are novel, complex, fact-intensive, and hotly disputed in a multitude of ongoing lawsuits across the country. Plaintiffs urge the Court to get out ahead of this incrementally developing law, paint with a broad brush, and make sweeping findings at the outset of this case. But the equitable principles underlying the Court's power to issue injunctions counsel in favor of caution. According to these principles, a preliminary injunction should not be issued in a case like this one: where the issues are novel, the legal environment is rapidly changing, and the public interest would be undermined by prejudging the merits. Resolving these issues in the ordinary course, on a complete record, best serves the public interest.

"A preliminary injunction is an 'extraordinary and drastic remedy'" that is "never

[29] John G. Roberts, Jr., *2023 Year-End Report on the Federal Judiciary*, Supreme Court of the United States (Dec. 31, 2023), https://www.supremecourt.gov/publicinfo/year-end/2023year-endreport.pdf.

awarded as a matter of right." *Munaf v. Geren*, 553 U.S. 674, 689 (2008) (quoting 11A C. Wright, A. Miller, & M. Kane, Federal Practice and Procedure § 2948, p. 129 (2d ed. 1995)). Such injunctions are "a matter of equitable discretion." *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 32 (2008). Courts "*may* grant one only if the plaintiffs present 'a clear showing' that they are likely to prevail on the merits, that they face irreparable harm without an injunction, that the balance of equities favors them, and that the public interest supports an injunction." *L. W. by & through Williams v. Skrmetti*, 83 F.4th 460, 471 (6th Cir. 2023) (quoting *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 22 (2008)) (emphasis added); *accord A.M.C. v. Smith*, 620 F. Supp. 3d 713, 732 (M.D. Tenn. 2022) (Crenshaw, J.).

Courts should exercise "extreme caution" before issuing preliminary injunctions, given their "summary nature" and "liability to abuse." Joseph Story, *Commentaries on Equity Jurisprudence as Administered in England and America* § 959b, at 626 (Stephen and Haynes 1884). Because of exigent circumstances, preliminary injunctions issue based on "procedures that are less formal and evidence that is less complete than in a trial on the merits." *Univ. of Tex. v. Camenisch*, 451 U.S. 390, 395 (1981). A defendant may be enjoined based on hearsay evidence, without the opportunity for discovery, a complete record, or full legal briefing. Thus, as this Court has recognized, "'[t]here is no power the exercise of which is more delicate, which requires greater caution, deliberation, and sound discretion, or more dangerous in a doubtful case, than the issuing of an injunction.'" *Newsom v. Golden*, 602 F. Supp. 3d 1073, 1079 (M.D. Tenn. 2022) (Crenshaw, J.) (quoting *Detroit Newspaper Publishers Ass'n v. Detroit Typographical Union No. 18*, 471 F.2d 872, 876 (6th Cir. 1972)). There are good reasons for caution here.

First, Plaintiffs' demand for a preliminary injunction depends upon cutting-edge legal questions about the application of copyright law to generative AI. But as an extraordinary

exercise of a court's equitable powers, preliminary injunctions should not issue "in doubtful cases, or new ones, not coming within well established principles." *Detroit Newspaper Publishers Ass'n*, 471 F.2d at 876 (quoting 3 Barron & Holtzoff, Federal Practice and Procedure (Wright Ed.) § 1431 (quoting *Bonaparte v. Camden & A.R. Co.*, 3 F. Cas. 821, 827 (C.C.D.N.J. 1830))); *accord Bonnell v. Lorenzo*, 241 F.3d 800, 826 (6th Cir. 2001) (citing *Detroit Newspaper Publishers Ass'n*, 471 F.2d at 876). Thus, courts may properly deny preliminary relief where the law is "not well-established," *Bonnell*, 241 F.3d at 826 (reversing grant of preliminary injunction), or the "issue is one of first impression," *Am. Fed'n of State, Cnty., Mun. Emps. Loc. 1733 v. City of Memphis*, 2012 WL 4602374, at *8 (W.D. Tenn. Sept. 28, 2012) (denying preliminary injunction in part because the issue was "one of first impression"). The legal principles Plaintiffs urge this Court to adopt are undoubtedly "new" and far from "well[-]established." *See Detroit Newspaper Publishers Ass'n*, 471 F.2d at 876. Whether the use of copyrighted works in generative AI training and output constitutes infringement and whether it is nonetheless protected as fair use are cutting-edge legal questions that have yet to be clearly answered by any court. While "courts are never foreclosed from entertaining novel arguments," courts should be wary of adopting them in emergency proceedings, where they lack "the time or resources for the careful deliberation that [they] would normally undertake." *Pleasant View Baptist Church v. Beshear*, 838 F. App'x 936, 942 (6th Cir. 2020) (Donald, J., concurring).

Relatedly, caution is warranted because the application of copyright law to generative AI training and output is hotly disputed and fast-developing. Courts may decline to issue a preliminary injunction in a "fluctuating legal environment." *Benisek v. Lamone*, 138 S. Ct. 1942, 1945 (2018) (affirming denial of a preliminary injunction); *see also Morgan v. Bevin*, 298 F. Supp. 3d 1003, 1013 (E.D. Ky. 2018) (denying preliminary injunction because it was

not "'clearly needed'" in a "new and developing area of law"). For example, in *Benisek*, the district court refused to enter a preliminary injunction in part because other pending litigation "had the potential to 'shed light on critical questions in th[e] case.'" 138 S. Ct. at 1945 (quoting *Benisek v. Lamone*, 266 F. Supp. 3d 799, 815 (D. Md. 2017)). It concluded that it would be "a mistake" to "'charg[e] ahead' and adjudicat[e] the plaintiffs' claims in that fluctuating legal environment." *Id.* (quoting *Benisek*, 266 F. Supp. 3d at 816). The Supreme Court subsequently affirmed that exercise of caution as within the district court's "sound discretion." *Id.*

The "fluctuating legal environment" involving copyright and generative AI justifies denying Plaintiffs' request for an unprecedented preliminary injunction. *Benisek*, 138 S. Ct. at 1945. "The forces and directions of the Internet are so new, so protean, and so far-reaching that courts must be conscious that what they say today might be obsolete tomorrow." *Packingham v. North Carolina*, 582 U.S. 98, 105 (2017). The same questions presented by Plaintiffs' lawsuit have been raised in a host of other copyright lawsuits against providers of AI tools.[30] Some of the cases are far advanced—one has even passed the summary judgment stage and is slated for trial this summer. *See Thomson Reuters Enter. Ctr. GmbH v. Ross*

[30] *See, e.g.*, *Thomson Reuters Enter. Centre GmbH v. ROSS Intel. Inc.*, No. 1:20-cv-00613-SB (D. Del. filed May 6, 2020); *Doe 1 v. GitHub, Inc.*, No. 4:22-cv-06823 (N.D. Cal. filed Nov. 3, 2022); *Andersen v. Stability AI Ltd.*, No. 3:23-cv-00201 (N.D. Cal. filed Jan. 13, 2023); *Getty Images (US), Inc. v. Stability AI, Inc.*, No. 1:23-cv-00135 (D. Del. filed Feb. 3, 2023); *Tremblay v. OpenAI, Inc.*, No. 4:23-cv-03223 (N.D. Cal. filed June 28, 2023); *Silverman v. OpenAI, Inc.*, No. 3:23-cv-03416 (N.D. Cal. filed July 7, 2023); *Kadrey v. Meta Platforms Inc.*, No. 3:23-cv-03417 (N.D. Cal. filed July 7, 2023); *J.L. v. Alphabet, Inc.*, No. 3:23-cv-03440 (N.D. Cal. filed July 11, 2023); *Chabon v. OpenAI, Inc.*, No. 3:23-cv-04625 (N.D. Cal. filed Sept. 8, 2023); *Chabon v. Meta Platforms Inc.*, No. 3:23-cv-04663 (N.D. Cal. filed Sept. 12, 2023); *Authors Guild v. OpenAI, Inc.*, No. 1:23-cv-08292 (S.D.N.Y. filed Sept. 19, 2023); *Sancton v. OpenAI Inc.*, No. 1:23-cv-10211 (S.D.N.Y. filed Nov. 21, 2023); *The New York Times Co. v. Microsoft Corp.*, No. 1:23-cv-11195 (S.D.N.Y. filed Dec. 27, 2023); *Huckabee v. Meta Platforms, Inc.*, No. 3:23-cv-06663 (N.D. Cal. filed Dec. 28, 2023); *Basbanes v. Microsoft Corp.*, No. 1:24-cv-00084 (S.D.N.Y. filed Jan. 5, 2024).

Intel. Inc., 2023 WL 6210901 (D. Del. Sept. 25, 2023) (finding genuine disputes of material fact as to infringement and fair use); *Thomson Reuters*, No. 1:20-cv-00613-SB, ECF No. 581 (setting trial for August 26, 2024). Many of these cases are in discovery, where full factual records are being developed and expert testimony will be brought to bear. Rulings in these other pending cases, with the benefit of those fully-developed records, will shed light on the critical issues in this case, to the benefit of the parties and the Court.

Second, prejudging the merits of Plaintiffs' theories would disserve the public interest. Particularly where a preliminary injunction "will adversely affect a public interest," courts "may in the public interest withhold relief until a final determination of the rights of the parties." *Yakus v. United States*, 321 U.S. 414, 440 (1944). Here, before issuing any injunction, the Court would need to assess Plaintiffs' likelihood of prevailing on a number of debatable legal and factual points. Many may have broad implications for the development of generative AI, including what material can be used to train AI models, what output can be generated, and who is responsible for that output. If the emergency posture and limited record here cause a mistaken prejudgment of the merits, the ruling could inappropriately chill development of generative AI, risk derailing a nascent but critical industry, and deprive the public of generative AI's substantial benefits, including benefits yet to be discovered.[31]

Even assuming Plaintiffs were to ultimately prevail based on a complete record, injunctions do not "automatically" follow even from final judgments of infringement, much

[31] Summary proceedings are especially concerning in light of Plaintiffs' sweeping demands for relief. Plaintiffs seek relief for "millions" of copyrighted works, based on 500 "illustrative" works, five "distinct" infringement theories, and an unknown number of supposedly infringing outputs. *See* ECF No. 41 at 2, 12. Even assuming Plaintiffs can establish a prima facie case for copyright infringement, Plaintiffs must still overcome a substantial fair use defense. That defense is intensely fact-specific and "requires an analysis of [each] specific 'use' of a copyrighted work that is alleged to be 'an infringement.'" *Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith*, 598 U.S. 508, 533 (2023) (quoting 17 U.S.C. § 107). It would be difficult to give so many issues full and fair consideration in this preliminary posture.

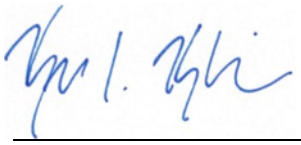
less preliminary findings based on a limited record. *See, e.g.*, *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 392–93 (2006) ("[T]his Court has consistently rejected invitations to replace traditional equitable considerations with a rule that an injunction automatically follows a determination that a copyright has been infringed."); *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 578 n.10 (1994) (the "goals of the copyright law … are not always best served by automatically granting injunctive relief"); *N.Y. Times Co. v. Tasini*, 533 U.S. 483, 505 (2001) (citing *Campbell*, 510 U.S. at 578 n.10). Copyright does not trump the public's interest in access to information. *See, e.g.*, *ABKCO Music, Inc. v. Sagan*, 50 F.4th 309, 323 (2d Cir. 2022) (reversing entry of a permanent injunction in a music copyright case in part "because the public has an interest in accessing 'iconic' recordings of historical importance").

The most prudent course is to deny Plaintiffs' motion without passing on the merits. The Court has discretion to do so: "[w]hen one [*Winter*] factor is dispositive, a district court need not consider the others." *D.T. v. Sumner Cnty. Sch.*, 942 F.3d 324, 327 (6th Cir. 2019); *see also Newsom*, 602 F. Supp. 3d at 1079 ("[T]he Court 'is not required to make specific findings concerning each of the four factors … if fewer factors are dispositive of the issue.'" (quoting *Certified Restoration Dry Cleaning Network, LLC v. Tenke Corp.*, 511 F.3d 535, 542 (6th Cir. 2007)). Before seeking an injunction on a novel legal issue with far-reaching consequences, Plaintiffs should "see that the factual record is adequate." *Cf. Congregation Lubavitch v. City of Cincinnati*, 941 F.2d 1209 (6th Cir. 1991) (unpublished table decision) (declining to review an expired preliminary injunction).

CONCLUSION

For these reasons, *amici* respectfully request that the Court deny Plaintiffs' motion for a preliminary injunction.

Respectfully submitted,



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I certify that I filed the foregoing Amicus Brief on the Court's CM/ECF system on this 19th day of January, 2024, which forwarded a copy to:

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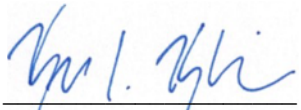

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